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No. 00-1327

In the Supreme Court of the United States

ADELE J. FASANO,
DISTRICT DIRECTOR INS,
Petitioner,

v.

MARIO RICHARDS-DIAZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether habeas corpus review was available to Respondent under jurisdiction of the 9th Circuit?

2. In enacting Section 440(d), has Congress violated the Equal Protection Clause of the U.S. Constitution?

3. Should the Court terminate proceedings under the theory of Nunc Pro Tunc?

4. Is Respondent being subjected to an impermissible retroactive application of the laws under AEDPA and IIRAIRA, and how does Magana-Pizano apply to this case?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 233 F.3d 1160 (Petitioner's App., infra, 1a-11a). The order of the district court (Petitioner's App., infra, 19a-28a) is unreported, as are the order of the Board of Immigration Appeals (Petitioner's App., infra 12a-13a) and the decision of the immigration judge (Petitioner's App., infra, 14a-18a).

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions are as follows: Antiterrorism and Effective Death Penalty Act, §440(d). Federal Court Review Notwithstanding the 1996 Act, 74 Interpreter Releases 257 (February 10, 1997). Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §309(c)(4)(G). Immigration and Nationality Act, §212(c); 241(a)(2)(A)((i), (ii) and (iii); 106(a)(10).

STATEMENT OF THE CASE

1. Subject matter jurisdiction followed the holding in Magana-Pizano v. INS, 200 F.3d 603, 609 (9th Cir. 2000) in which the court held that neither IIRIRA's permanent nor transitional rules repeal the statutory habeas corpus remedy available via 28 U.S.C. §2241.

2. The 9th Circuit determined that an evidentiary hearing should be held to determine whether Richards can make specific showings, based on alleged reliance on 212(c), that the retroactive application of the repeal of 212(c) is impermissible as to him and the case was remanded for that purpose.

ARGUMENT

A.

Habeas corpus review is available to Respondent

1.

Respondent meets the subject matter jurisdiction requirement because he has raised a substantial constitutional question

The court has jurisdiction to decide Respondent's request because he alleges a violation of the Constitution or law or treaties of the United States. *See* 28 U.S.C. Section 2241; Magano-Pizano v. INS, 152 F.3d 1213 (9th Cir. 1998).

In Magana-Pizano v. INS, 152 F.3d 1213, 1222 (9th Cir. 1998), the court explained " . . . the plain language of 28 U.S.C. Section 2241 provides an unambiguous grant of jurisdiction to the district courts, stating, 'Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions' . . . Regardless of these policy considerations, in the end the choice of jurisdictional assignment is a Congressional one, and Congress vested the district courts with the power to review habeas corpus petitions. It is not only a proper choice, but one which we lack the power to judicially divest."

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651. "Now as before, the district courts possess habeas corpus jurisdiction under §2241 to review final orders of deportation, exclusion or removal and any predicate decisions on which those orders may be based." Federal Court Review Notwithstanding the 1996 Act, 74 Interpreter Releases 257 (February 10, 1997). Here, the INS cannot repeal the courts power to issue forms of relief available to Respondent under 28 U.S.C. §1651 because AEDPA did not specifically or impliedly state that it could repeal the federal court's power to grant relief to aliens that have been denied by the Board of Immigration Appeals (BIA).

The court in Michael v. INS determined that Section 1651 empowers courts to prevent the INS from taking measures including deportation, that will deprive the court of its current or prospective jurisdiction. The court further states, "In extraordinary cases, the All Writs Act provides federal Court of Appeals with independent statutory basis to stay deportation order . . . the All Writs Act empowers federal courts of appeal to stay orders of deportation in order to safeguard the court's appellate jurisdiction." Michael v. INS, 48 F.3d 657 (2nd Cir. 1995).

The Supreme Court in Heikkila v. Barber found that aliens facing deportation or exclusion were constitutionally entitled to judicial review of that order. Specifically, Heikkila found that habeas review is constitutionally required for such aliens facing deportability or exclusion. Heikkila v. Barber, 345 U.S. 229 (1953). In U.S. ex. rel. Accardi v. Shaughnessy, the Court exercised jurisdiction and reversed a denial of discretionary relief, thereby confirming the

availability of habeas review where aliens challenged only the denial of discretionary relief. United States ex. rel. Accardi v. Shaughnessay, 347 U.S. 260 (1954).

The Court in Eltayeb v. Ingham, further expanded upon previous court precedent concerning the availability of habeas corpus by stating, "Unlike the post-conviction habeas that arises only after a judicial process with several levels of appeals has run its course, the immigration habeas is the only judicial check on the legality of the Executive Branch's deportation decision." Eltayeb v. Ingham, 950 F.Supp. 95 (U.S. Dist. Ct., S.D. New York, 1997)

2.

Habeas Corpus is available to Respondent under the Suspension Clause of the U.S. Constitution.

Under Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998), the Court of Appeals for the First Circuit reversed the district court's dismissal of an alien's habeas petition, holding that Congress did not eliminate habeas jurisdiction under 2241. Similarly, the Court of Appeals for the Ninth Circuit held in Magana-Pizano v. INS, 152 F.3d 106 (2nd Cir. 1998), that jurisdiction was retained for habeas under the Suspension Clause of the U.S. Constitution which requires that individuals be given opportunity for writ of habeas.

"Judicial review of deportation orders by habeas corpus available under the Suspension Clause of the Constitution encompasses at least review of the statutory merits of alien's complaint, and is not limited to the very narrow standards of review applied to review of federal and state court convictions." Perez v. Reno, 18 F. Supp. 2d 674 (U.S. Dist. Ct. W.D. Texas, 1998).

AEDPA and IIRAIRA judicial review provisions do not preclude the courts of appeals from reviewing substantial constitutional challenges to orders of removal, even for criminal aliens. Such review easily satisfies the minimal level of judicial review as required by Article I, clause 2 of the Constitution which prohibits suspension of the writ of habeas corpus

3.

"American-Arab is limited in scope because it only applies to issues of discretionary relief and not issues of detention. As a result it is a case distinguishable from Goncalves and Magana-Pizano"

The Court held in American-Arab Anti-Discrimination Committee, that 8 U.S.C. §1252(g), which limits jurisdiction of immigration cases, only applies to three discrete actions by the Attorney General, including commencement of proceedings, adjudication of proceedings or execution of removal orders. This narrow ruling does not give the Attorney General the power to review habeas corpus proceedings when many times the Attorney General is the respondent of the immigration proceedings. To do so, would be a conflict of interest and would interfere with the Attorney General's executive duties. American-Arab Anti-Discrimination Committee v. Reno, Supreme Court decision No. 97-1252 (February 24, 1999).

"In short, the Supreme Court found that section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion . . .In those cases, and only those cases, the Supreme Court found that 8 U.S.C. §1252(g) deprives the federal courts of jurisdiction." Haddam v. Reno, 1999 WL 258420 (April 28, 1999). See American-Arab Anti Discrimination Committee

at 947. Here, the "Anti-Arab" case is completely distinguishable from the Goncalves decision. The "Anti-Arab" case involves the discretionary decision of the INS to prosecute specific aliens. Whereas Goncalves involves jurisdiction for a writ of habeas corpus. The "Anti-Arab" case is limited in scope to direct decisions regarding commencement, adjudication and execution of INS decisions. Statutory interpretation of Constitutional issues is ancillary to the decision to adjudicate proceedings or commence proceedings.

" . . . neither the decision to detain nor the decision the use secret evidence falls within the provision's literal language. While the decision to detain is ancillary to the decision to commence proceedings, it is nonetheless a separate and distinct decision that does not involve the exercise of prosecutorial discretion, and hence cannot be characterized as falling within one of the three distinct actions of the Attorney General covered by 1252(g). This has been held to be true in a recent case as well, Parra v. Perryman, 1999 WL 173692 (7th Cir. 1999)." See Haddam.

As a result of the recent decision in "Anti-Arab", cases which involve Constitutional interpretation are completely distinguishable from cases solely involving 1252(g). The court in Goncalves held that habeas jurisdiction is available to those alien's seeking bond relief. That decision has yet to be challenged and stands as good law distinguishable from the "Anti-Arab" case.

Furthermore, "Goncalves decided that the district court was the appropriate forum and that habeas jurisdiction encompassed the resolution of the pure issue of law concerning whether Congress intended to make a particular provision of a statute retroactive." Pak v. Reno, 8 F. Supp.

2d 1001 (U.S. N.D. Ohio 1998). Here, as is the case in Goncalves, Respondent is requesting relief regarding an issue of law and not an issue of discretionary actions taken by the court or the Attorney General.

4.

Magana-Pizano stands as good law because it is distinguishable from the Hose case

Magana-Pizano has been remanded by the Supreme Court to determine whether precluding habeas review violates the Suspension clause of the U.S. Constitution. "*Magana-Pizano* court did what the other courts, not bound by prior authority such as *Hose*, had the luxury to avoid: it decided the issue on constitutional grounds, holding Section 242(g) to be unconstitutional as applied to *Magana-Pizano* and other similarly situated aliens, essentially because with the unavailability of habeas review, such persons are left with no recourse." 76 Int. Rel. 416 (March 15, 1999).

The Magana-Pizano court had distinguished Hose on the basis that Hose had been decided in the context of an appeal of a discretionary administrative decision for which alternative judicial remedies existed. The Magana-Pizano court also noted that Hose had expressly reserved the question of whether Section 242(g) violated the Suspension Clause where no other avenue of judicial review existed.

5.

Goncalves and Henderson remain intact as successful challenges to 8 U.S.C. § 1252(g) because the Supreme Court denied certiorari to both cases.

Without comment, the Supreme Court denied certiorari in Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998)

and Henderson v. Reno, 157 F.3d 106 (2nd Cir. 1998). As a result, the Supreme Court's actions acts as a vindication for the right to judicial review and will help strengthen the argument against the Justice Department's position on judicial review issues in lower courts. Moreover, Goncalves and Henderson remain intact as good law because the Supreme Court would have remanded the decisions for further action had it deemed the law improper. If the Supreme Court would have interpreted the law in Goncalves improper, it would have stated so in a comment; here it did not do so.

6.

The law under 8 U.S.C. §1252(g) and 8 U.S.C. §1226(e) contain general language which will not overturn the specific language of 28 U.S.C. §2241

"As with 8 U.S.C. §1252(g), 8 U.S.C. §1226(e) does not contain a clear and express statement that habeas jurisdiction has been modified in any way . . . courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute, and consequently, only a plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice." Velasquez v. Reno, 37 F.Supp. 2d 663 (U.S. Dist. D. N.J. 1999).

Basic statutory construction supports application of the specific provision because specific takes precedent over the general. Perez v. Reno, 18 F. Supp. 2d 674 (U.S. Dist. Ct. W.D. Texas, 1998). But even after INA Section 106 was enacted, the traditional statutory writ of habeas corpus under 28 U.S.C. §2241 continued to provide jurisdiction for district court review of deportation and exclusion proceedings, as it has since the late 1800's. Sabino v. Reno, 8 F. Supp. 2d 622 (U.S. Dist. S.D. Texas, 1998).

Almost every district court to construe section 440(a) has held that it does not repeal the jurisdiction in 2241 to review deportation orders. See Cruz v. Reno, 6 F. Supp. 2d 744 (N.D. Ill. 1998); Billett v. Reno, 2 F.Supp.2d 368 (W.D.N.Y. 1998); Barrett v. INS, 997 F. Supp. 896 (N.D. Ohio 1998); Guiterrez-Martinez v. Reno, 989 F. Supp. 1205 (N.D. Ga. 1998), etc.

B.

The Constitution limits Congress' power to repeal the role of the federal courts in our tripartite system of government

(1)

The Due Process Clause constitutes independent constitutional grounds for judicial review

Here, Respondent has a constitutional right to due process under the laws of the United States because deportation involves an individual's fundamental liberty interest. This constitutional right is preserved and should not be exacerbated by legislation which attempts to deny Respondent's right to appeal a BIA decision in the 9th Circuit Court of Appeals. Respondent's Due Process rights are explained in Bridges, "In that connection, it must be remembered that although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling . . . Deportation is not a criminal punishment, but it may deprive an alien of the right to pursue a vocation or result in the loss of all that makes life worth living." Bridges v. Wixon, 326 U.S. 135 (1945).

The Supreme Court has also stated that, "once an alien gains admission to our country and begins to develop ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a

continuously present alien is entitled to a fair hearing when threatened with deportation, and, although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation." Landon v. Plasencia, 459 U.S. 21, 32-33 (1982).

(2)

The Separation of Powers principle embodied in Article III restricts Congress' power to preclude judicial review.

Although Congress does have plenary power over matters of immigration, that power is "subject to judicial intervention under the paramount law of the Constitution." Carlson v. Landon, 342 U.S. 524, 537 (1952). Congress' plenary power to enact AEDPA legislation must be limited by judicial review so that Congress' power does not tip the delicate balance in which our tripartite government was created.

"Article III, §1, serves both to protect the role of independent judiciary within the constitutional scheme of tripartite government and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 848 (1986). The role of the judiciary branch to interpret Congressional legislation is of paramount necessity in establishing a fair and balanced democratic system. Once a branch of government supersedes the role of another branch of government, the delicate balance of democracy is tipped and our umbrella of government will contain gaping holes.

" . . . our precedents establish that Article III, §1, not only preserves to litigants their interest in an impartial and

independent federal adjudication of claims within the judicial power of the Untied States, but also serves as an inseparable element of the constitutional system of checks and balances, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other." Id. at 850. Here, Respondent has a constitutional right that a form of independent judicial review is available to determine whether the BIA has demonstrated an abuse of discretion or whether their legislative interpretation is based on speculation and conjecture.

II.
STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. In enacting Section 440(d), has Congress violated the Equal Protection Clause of the U.S. Constitution?

B. Should the Court terminate proceedings under the theory of Nunc Pro Tunc?

C. Is Respondent being subjected to an impermissible retroactive application of the laws under AEDPA and IIRAIRA, and how does Magana-Pizano apply to this case?

III.
STATEMENT OF THE CASE

Respondent was convicted on February 21, 1996 for Transportation of a Controlled Substance in violation of 11379(a) of the California Health and Safety Code. Respondent was released from criminal custody on June 16, 1996 without incident.

In June of 1997, INS issued a Notice to Appear, charging respondent as removable from the U.S. under §237(a)(2)(A)(iii) for being convicted of an aggravated felony.

At the individual hearing on October 10, 1997, the immigration judge pretermitted all applications and denied motion to terminate. Respondent reserved appeal. On January 28, 1999, the BIA dismissed Respondent's appeal. On September 3, 1999, the District Court denied Respondent's Writ of Habeas Corpus. A review of the District Court's denial of writ was filed by respondent along with a motion for a stay of deportation. The motion for stay was granted on December 20, 1999. The original briefing schedule was held in abeyance pending the decision of Magana-Pizano v. INS, 119 S.Ct. 1137 (1999).

IV.
STATEMENT OF THE FACTS

Respondent is a thirty-two year old native and citizen of Mexico who was lawfully admitted to the United States on April 25, 1975. On February 21, 1996, Respondent was convicted in the Superior Court of California, County of San Diego, of transportation of a controlled substance in violation of California Health and Safety Code Section 11379(a). Respondent was sentenced to 180 days incarceration.

On June 16, 1996, Respondent was released from jail. The INS did not place an immigration hold on him and he was not released into INS custody. One year later, on June 20, 1997, following his arrest for driving with a suspended license, Respondent received an immigration charging document (Notice to Appear).

Respondent was charged with removability under Immigration and Naturalization Act (INA) Section 237(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony. On September 2, 1997, Respondent filed an application for a waiver under INA Section 212(c). On October 10, 1997, the Immigration Court ruled Respondent was removable and ineligible for the requested relief based on the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). On January 28, 1999, the BIA denied Respondent's appeal of the Immigration Court's decision.

Respondent now asks this Court for declaratory and injunctive relief, to protect Respondent's rights under the Due Process and Equal Protection Clauses of the Fifth Amendment to the United States Constitution and under applicable federal law. Respondent also asks that this Court issue a writ of habeas corpus and enjoin Respondent's imminent removal from the United States.

V.
ARGUMENT
A.
IN ENACTING SECTION 440(d) of AEDPA, CONGRESS DISTINGUISHED BETWEEN EXCLUSION AND DEPORTATION PROCEEDINGS

The distinction between exclusion and deportation has long been recognized in immigration law. "The meaning of each term is well defined, and the significant differences between them are clear." Landon v. Plasencia, 459 U.S. 21, 25-26 (1982). "In addition, the rights available to persons in exclusion proceedings are significantly different from those provided in deportation proceedings." Id. "Congress, which had created these important distinctions between deportation

and exclusion proceedings, was obviously aware of them when it enacted the AEDPA." In re Fuentes-Campos, Interim Decision 3318 (BIA 1997).

"Prior to its amendment, section 212(c) of the Act barred from eligibility those aliens who had been convicted of certain offenses. This inclusive language covered both aliens in exclusion proceedings and those in deportation proceedings. By enacting section 440(d) of the AEDPA, Congress omitted the inclusive language of section 212(c), which made a waiver unavailable to certain aliens regardless of whether they were in exclusion or deportation proceedings. Congress replaced that language with a more limited provision making relief unavailable to any alien who is deportable by reason of having committed any criminal offense covered in specified grounds of deportability." In re Fuentes-Campos, supra.

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). "The paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole." Matter of Grinberg, 20 I&N Dec. 911, 912 (BIA 1994). "Presumably, the legislative purpose is expressed by the ordinary meaning of the words used." Matter of W-F-, Interim Decision 3288 (BIA 1996).

The BIA recently decided the intent of Congress is evident in the plain meaning of Section 440(d): "We find that the plain language of the amendment to section 212(c), as construed within the context of the well-established statutory distinctions between deportation and exclusion, provides that the bar to eligibility for relief applies only to specified

criminal aliens who are in deportation proceedings." In re Fuentes-Campos, Interim Decision 3318 (BIA 1997).

B.

SECTION 440(d) OF AEDPA VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BY MAKING AN IMPERMISSIBLE DISTINCTION BETWEEN ALIENS WHO ARE IN EXCLUSION PROCEEDINGS AND ALIENS WHO ARE IN DEPORTATION PROCEEDINGS

The standard for judging whether the distinction between excludable and deportable aliens violates Respondent's equal protection rights is the rational basis test: the distinction must rationally relate to a legitimate governmental interest. See Paointhara v. INS, 708 F.2d 472, 473 (9th Cir. 1983).

"Under the minimal scrutiny test, . . . distinctions between different classes of persons must be reasonable, not arbitrary, and must rest upon some ground of difference having fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Francis v. INS, 532 F.2d 268, 272-73 (2nd Cir. 1976). "When the INS distinguishes one class of aliens for different treatment there must be some rational basis for doing so; otherwise, its classification is wholly irrational." Garberding v. INS, 30 F.3d 1187, 1190 (9th Cir.1994).

In Francis, the Second Circuit held that, in order to satisfy equal protection requirements, Section 212(c) relief must be available to both deportable and excludable aliens. Francis, 532 F.2d at 269. The Francis rule was adopted by the Ninth Circuit in Tapia-Acuna v. INS, 640 F.2d 223, 225 (9th Cir. 1981), in which the court held that distinguishing

between excludable and deportable aliens in determining the availability of Section 212(c) relief lacked a rational basis and constituted a violation of equal protection. Although Congress tried to reinstate the difference between exclusion and deportation with Section 440(d) of AEDPA, the reasoning and holding in Tapia-Acuna remain viable: "no purpose would be served by giving less consideration to the alien 'whose ties with this country are so strong that he has never departed after his initial entry' than to the alien 'who may leave and return from time to time.'" Tapia-Acuna, 640 F.2d at 225 (quoting Francis, 532 F.2d at 273). Congress has still not elucidated a clear, rational, lawful objective for distinguishing between exclusion and deportation for purposes of Section 212(c).

The scenario in Yeung v. INS, 76 F.3d 337 (11th Cir. 1995) presents a useful analogy. In that case, Mr. Po was placed in deportation proceedings and applied for 212(h) relief. He was deemed ineligible for the waiver because it was a remedy reserved for exclusion proceedings. Mr. Po argued that this distinction violated his right to equal protection. The Eleventh Circuit agreed.

"To claim, as the INS does here, that Po belongs to a different classification of persons simply by virtue of his failure to depart and reenter, is to recognize a distinction that can only be characterized as arbitrary . . . We find that Po and Sanchez are similarly situated and deserving of similar treatment under the law. In particular, as deportable aliens they are equally deserving of waiver consideration by the Attorney General." Id. at 340, referring to Matter of Sanchez, 17 I&N Dec. 218 (BIA 1980). The court continued: "In practical effect, the BIA has applied §212(h) so as to create two classifications of aliens identical in every respect but for the fact that the members of one classification departed

and returned and the members of the other did not." Id. at 341.

"We fully acknowledge the broad authority of Congress to enact legislation controlling the flow of immigration, and the authority of the Executive to interpret and execute the laws so enacted. But once Congress and the Executive have acted, we are obliged to safeguard the rights of citizens and aliens alike to equal protection under the law so that individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate government interest." Id. at 341. In this case, Respondent has been subjected to disparate treatment because, as the court stated in Fuentes-Campos, Section 440(d) of AEDPA creates a distinction between excludable and deportable aliens regarding the availability of Section 212(c) relief. In Tapia-Acuna, the court held that this distinction constitutes a violation of equal protection because it is not rationally related to a legitimate government objective. Since the enactment of AEDPA, numerous courts have followed the reasoning of Tapia-Acuna and declared that Section 440(d) violates the constitutional rights of aliens in deportation proceedings. See Vargas v. Reno, 966 F.Supp. 1537, 1547 (S.D.Cal. 1997); Jurado-Gutierrez v. Greene, 977 F.Supp. 1089, 1093 (D.Colo. 1997); Cruz-Walters v. Reno, 16 F.Supp.2d 166, 170-71 (D.P.R. 1998).

C.

THE COURT SHOULD TERMINATE THE REMOVAL PROCEEDINGS FOR THE PURPOSE OF REOPENING THE MATTER IN DEPORTATION PROCEEDINGS UNDER THE THEORY OF NUNC PRO TUNC

"Nunc pro tunc is an entry made now of something actually previously done to have effect of former dates; office

being not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertence or mistake." Seabolt v. State, 357 P.2d 1014 (1960). "Nunc pro tunc merely describes the inherent power of the court to make its records speak the truth, i.e., to correct the record at a later date to reflect what actually occurred . . ." Simmons v. Atlantic Coast Line R. Co., D.C.S.C., 235 F. Supp. 325, 330 (1964). "Nunc pro tunc signifies now for then, or, in other words, a thing is done now, which shall have the legal effect as if done at the time when it ought to have been done." State v. Hartley, 384 P.2d 252, 254 (1963).

In this case, the court should place Respondent in deportation proceedings to insure that Respondent is afforded equal protection and due process under the laws of the United States. Respondent was arrested and convicted before the enactment of the new law. He was subsequently released from jail before the effective date of the new law. Respondent's presence in removal proceedings, as opposed to the former deportation proceedings, is an arbitrary result of the INS' lack of diligence. Under their own regulations, the INS should have instituted proceedings when Respondent was released from prison in June of 1996. Instead, the INS acted negligently and did not initiate the immigration proceedings until a full year had elapsed. The negligence of the INS should not rob Respondent of his opportunity for Section 212(c) relief. The court can correct the INS' mistake by putting Respondent in deportation proceedings, which is where he should have been in June of 1996.

Once the court exercises its power to terminate removal proceedings and reopen the case in deportation proceedings, Respondent can properly pursue a waiver of deportation. As outlined in Section D, the reasoning of Francis and Tapia-Acuna remain valid today. An alien who

is in deportation proceedings should have the same opportunity for discretionary relief as an alien in exclusion proceedings. Therefore, based on the theory of nunc pro tunc and Respondent's established right to equal protection before the passage of IIRIRA, Respondent should be eligible for a discretionary waiver of deportation under Section 212(c).

D.

RESPONDENT IS BEING SUBJECTED TO AN IMPERMISSIBLE RETROACTIVE APPLICATION OF AEDPA AND IIRIRA BECAUSE STATUTES AFFECTING SUBSTANTIVE RIGHTS SHOULD ONLY APPLY PROSPECTIVELY

In Landgraf v. USI Film Products, 511 U.S. 244 (1994) and Hughes Aircraft v. United States, 520 U.S. 939 (1997), the Supreme Court reaffirmed the strong presumption against the retroactive application of new statutes. "As a general rule, we presume that statutes affecting substantive rights or obligations apply prospectively only. This presumption applies when a new statute impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already." Duldulao v. INS, 90 F.3d 396, 398 (1996).

In pleading guilty, Respondent relied on the law that was in effect on February 21, 1996. Respondent recognized the plea jeopardized his right to remain in this country. However, Respondent also knew the immigration law afforded him an opportunity for a waiver of deportation under Section 212(c). In the months following his conviction, AEDPA and IIRIRA were enacted and Respondent's substantive rights were drastically altered. Respondent argues that the application of AEDPA and IIRIRA to his conviction constitutes an improper retroactive application of the law.

In Wallace v. Reno, 24 F.Supp.2d 104, 112 (D.Mass. 1998), the court held that AEDPA did not apply to cases where the deportable alien had entered a plea of guilty before the date of AEDPA's enactment. Like Respondent, the defendant in that case plead guilty to a drug offense in February of 1996, but was not placed in immigration proceedings until after the enactment of the new law. In determining whether Respondent should be eligible for Section 212(c) relief, the court reasoned that the date of the underlying conduct, in this case the conviction which made Respondent deportable, was more relevant than the date on which proceedings were formally instituted. Id. at 115. The court noted that the immigrant has little control over when the case will be initiated by the INS and said: "As with the date on which a 212(c) application was filed, the date on which a deportation case becomes a pending case is not a relevant past event within the Landgraf framework." Id. at 115.

Focusing on considerations of logic and fairness, the court concluded: "There is a direct and meaningful connection between the operation of AEDPA's new rule barring 212(c) relief to many alien criminal offenders and a past event--those same offenders voluntary decision to waive their right to trial and plead guilty. AEDPA's bar to 212(c) relief attached new legal consequences to the guilty pleas after the fact. To apply those consequences now would offend principles of fair notice and respect for reasonable reliance and settled expectations." Id. at 111-12.

The only difference between Respondent and the defendant in Wallace is that the INS took a year longer to institute proceedings against Respondent. In all other respects, he is victimized by the same unfair application of the new law. For this reason, denying Respondent the opportunity for discretionary relief violates the presumption

against retroactivity, and Respondent should be able to apply for a Section 212(c) waiver.

E.
Respondent'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE CONSTITUTION LIMITS CONGRESS' POWER TO REPEAL THE ROLE OF THE FEDERAL COURTS

1. The Due Process Clause constitutes independent constitutional grounds for judicial review

Continuously present permanent resident aliens, such as Respondent, are entitled to due process. Landon v. Plasencia, 459 U.S. 21, 32 (1982). "The fundamental due process is the opportunity to be heard at a meaningful time and in a meaningful manner (procedural due process)." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

The Supreme Court has recognized the importance of Due Process in the immigration context: "In that connection, it must be remembered that although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling . . . Deportation is not a criminal punishment, but it may deprive an alien of the right to pursue a vocation or result in the loss of all that makes life worth living." Bridges v. Wixon, 326 U.S. 135, 154 (1945).

With that in mind, when dealing with the removal of an alien from this country, the Court stated "once an alien gains admission to our country and begins to develop ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present alien is entitled to a fair hearing when

threatened with deportation, and, although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation." Landon v. Plasencia, 459 U.S. 21, 32-33 (1982).

2. The Separation of Powers principle embodied in Article III restricts Congress' power to preclude judicial review

Although Congress does have plenary power over matters of immigration, that power is "subject to judicial intervention under the paramount law of the Constitution." Carlson v. Landon, 342 U.S. 524, 537 (1952). Congress' plenary power to enact AEDPA legislation must be limited by judicial review so that Congress' power does not tip the delicate balance of our tripartite system of government.

"Article III, §1, serves both to protect the role of independent judiciary within the constitutional scheme of tripartite government and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 848 (1986).

The Court also stated ". . . our precedents establish that Article III, §1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the Untied States, but also serves as an inseparable element of the constitutional system of checks and balances, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other." Id. at 850. Here, Respondent has a constitutional right that a form of independent judicial review

is available to determine whether the BIA has demonstrated an abuse of discretion or whether their legislative interpretation is based on speculation and conjecture.

F.

THE COURT IN MAGANA-PIZANO DETERMINED THAT THE RETROACTIVE APPLICATION OF AEDPA AND IIRIRA IS IMPERMISSIBLE FOR AN ALIEN WHOM PLEAD GUILTY TO A CRIME PRIOR TO ENACTMENT OF THE NEW LAW

In the present case, Respondent conceded guilt to the underlying crime on February 21, 1996. This pivotal event in his exclusion/removal proceedings occurred before the effective date of IIRIRA, April 1, 1997.

Prior to AEDPA, legal permanent residents could plead guilty or nolo contendre after receiving assurances in open court that the entry of the plea would not have any adverse immigration consequences. In fact, that might be the motivation for entering into the plea bargain. To those aliens who entered a plea in reliance upon representations of deportation consequences, the alteration of the law would severely disturb there settled expectations. Magana-Pizano v. INS, 1999 U.S. App. LEXIS 33814. Also, until the passage of IIRIRA, the definition of conviction for immigration purposes had been a fluid one. In re Roldan, Int. Dec. 3377, 1999 WL 126433 (BIA 1999). IRRIRA for the first time clarified that guilty pleas and nolo contendre pleas would be considered convictions. IIRIRA Section 322(a).

In addition, the district court in Wallace noted that it was widely recognized as a violation of an attorney's professional duty to his client not to advise him of the

immigration consequences of a plea or conviction. Wallace v. Reno, 24 F.Supp.2d 110 (1st Cir. 1999).

Here, Respondent relied on his attorney's advice and the court's determination that a plea of guilty or nolo contendre would not have adverse immigration consequences. Respondent would not have plead had he known of future changes in the law and that the law would apply to his case. Respondent had well-settled expectations that the law prior to enactment would apply to him prior to enactment of several new immigration laws.

As stated in Magana-Pizano v. INS, 1999 U.S. App. LEXIS 33814, ". . . . we leave open the possibility that, under a specific factual showing that a plea was entered in reliance on the availability of discretionary waiver under Section 212(c), a Respondent may be able to establish that AEDPA Section 440(d) has an impermissible retroactive application as to him."

Respondent's case is directly on point with Magana-Pizano. As in Magana-Pizano, he was convicted through a plea agreement of a drug crime prior to the enactment of AEDPA and IIRARA, and his requested relief is a 212(c) waiver.. Here, Respondent's original attorney may have advised him that any plea of guilty would bring no immigration repercussions because respondent was eligible for a 212(c) waiver at the time of his plea. Moreover, respondent could not have foreseen that a new immigration law would be enacted and retroactively take away his right to proper relief. At a minimum, Magana-Pizano mandates a hearing in front of an INS Judge to determine if respondent would have plead guilty had he known of the applicability of the new law.

"As a general rule, we presume that statutes affecting substantive rights or obligations apply prospectively only. This presumption applies when a new statute impairs rights a party possessed when he acted, increases a party's liability for conduct, or imposes new duties with respect to transactions already." Duldulao v. INS, 90 F.3d 396, 398 (1996). Here, Respondent relied on the law that was in place at the time of his original plea. Respondent's vested rights have been impaired as a result of the retroactive application of the new AEDPA legislation and IIRIRA amendments

CONCLUSION

Therefore, it is hereby requested that a writ of certiorari should not be held pending the court's decision in *INS v. St. Cyr*, No. 00-767, and *Calcano-Martinex v. INS*, No. 00-1011.

Respectfully submitted,

/s/_____

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